No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Federal Rule of Evidence 804(b)(1) makes former testimony admissible "if the party against whom the testimony is * * * offered * * * had an opportunity *and similar motive* to develop the testimony by direct, cross, or redirect examination" (emphasis added). The court of appeals held, however, that "the government's motive in examining the witnesses at the grand jury was *irrelevant*," Pet. App. 21a (emphasis added); see Pet. App. 24a, because the government had the ability to immunize them and thus make them available at trial.

Respondents seem unable to decide whether to defend the court of appeals' ruling. In some places,

they indicate that they agree with the court of appeals' conclusion that Rule 804(b)(1)'s express requirement of "similar motive" as a precondition to the admission of former testimony is "irrelevant" or "evaporates" (Pet. App. 21a) when the declarant invokes his Fifth Amendment privilege and the testimony is offered against the government. Thus, respondents argue that the court of appeals "demonstrat[ed] the irrelevance of motive," Resp. Br. 22 n.27, that the "*opportunity* [to cross-examine] is all that is required," Resp. Br. 26, and that " 'similar motive' * * * may not be relied on when doing so violates adversarial fairness," Resp. Br. 30. In other places, however, respondents take a different approach. They argue, in conflict with the district court's findings and the court of appeals' express acknowledgement that the government "may have had no motive before the grand jury to impeach the [declarants]," Pet. App. 19a, that the government *did* have a "similar motive" to develop the testimony of Bruno and DeMatteis in the grand jury. See Resp. Br. 19-30. In our view, both approaches are mistaken.

1. Respondents advance several arguments in support of the court of appeals' holding that the similar motive requirement is "irrelevant" to the admissibility of Bruno's and DeMatteis's testimony under Rule 804(b)(1). First, respondents decry what they term our "slavishly literal" reading of Rule 804(b)(1). Resp. Br. 31. They contend that "interpretation of statutes and rules on former testimony are often relaxed by courts to admit reliable hearsay." Resp. Br. 31. In support of that proposition, they cite a statement in an early edition of Dean McCormick's treatise on evidence. In addition, they assert that courts have added requirements not explicitly included in the Federal Rules. Resp. Br. 31-32.

Respondents' explanation betrays the same misapprehension of the legal status of the Federal Rules of Evidence that we identified in our opening brief. Br. 15-19. The Federal Rules of Evidence were enacted into law by Congress after extensive debate. By their own terms, they govern the admission of evidence in the federal courts. Fed. R. Evid. 101. They are, "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [their] mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). Thus, unlike the statutes mentioned in Dean McCormick's treatise, which were merely " 'declaratory' of the common law, so far as they go, and not the exclusive test of admissibility," McCormick, *Evidence* § 230, at 481 (1st ed. 1954), the Federal Rules of Evidence are a comprehensive codification of the law of evidence. Although many provisions of the Federal Rules give a trial court flexibility in ruling on the admission of evidence, the Rules leave no room for a court of appeals, dissatisfied with the result to which the Rules have led, simply to disregard directly applicable provisions of the Rules.[1]

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[1] The comprehensive nature of the Federal Rules is particularly evident in their exhaustive treatment of the law of hearsay, which includes a general prohibition on hearsay evidence (Rule 802), subject to 23 specific exceptions enumerated in Rule 803 and four enumerated in Rule 804, as well as the two residual exceptions in Rules 803(24) and 804(b)(5). While the Rules provide room for growth and adaptation of the law of evidence—in particular, in the residual exceptions—they leave no room for a court to hold hearsay evidence admissible despite its failure to satisfy either the specific exceptions or the residual exceptions.

Respondents' examples of alleged judicial departures from the requirements of the Federal Rules fail to establish respondents' broad principle that provisions of the Federal Rules may be dispensed with in the discretion of an appellate court. Thus, respondents assert that Rule 804(b)(1) does not specifically require that former testimony be given under oath if it is to be admissible. Resp. Br. 31-32. But that omission does not justify reading the term "testimony" out of the Rule; it simply requires a court to determine whether "testimony" within the meaning of the Rule can ever include unsworn statements. Similarly, respondents argue that the party against whom the testimony is offered must have been represented by counsel at the earlier proceeding. Resp. Br. 32. Any requirement of representation by counsel, however, is not one that is simply read into the Rule as a matter of a court's preference or sense of fairness; instead, it is a component of the opposing party's "opportunity" to develop the testimony at the prior proceeding. In short, respondents' examples illustrate that a court may refine the standards imposed by the Federal Rules in the course of applying the key terms of the Rules to a given case. But respondents' examples do not support their much more ambitious claim that a court may simply hold that evidence is admissible notwithstanding its acknowledged failure to satisfy the specific requirements of the Rules.

Second, respondents assert that, when a court's view of "adversarial fairness" demands it, any rule excluding reliable evidence "will be dispensed with." Resp. Br. 32. Initially, that principle, even if correct, would not support respondent's claim. The district court found the former testimony of Bruno and DeMatteis to be unreliable, see Pet. App. 51a, and to

lack any "circumstantial guarantee of trustworthiness," Tr. 18,319. The court of appeals did not disturb those findings. Accordingly, the testimony of Bruno and DeMatteis has to be considered *un*reliable, at least for purposes of this case. Respondents' principle, even if true, therefore would not suffice to establish that the testimony was admissible.[2]

In any event, respondents advance no persuasive argument in support of their broad principle that a court's view of "adversarial fairness" overrides specific requirements of the Rules. Respondents argue that each of the rules concerning evidentiary privileges proposed by the Advisory Committee—and rejected by Congress—included "an implied exception in the interest of adversarial fairness" that "cannot be found in the text." Resp. Br. 33. Of course, the evidentiary privileges at issue were *not* codified in the Federal Rules, and respondents' hypotheses concerning decisions that might have been reached had Congress accepted the Advisory Committee's rules

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[2] Respondents also argue (Resp. Br. 40-41) that applying Rule 804(b)(1) according to its terms in this case would trigger the need to reach constitutional issues concerning their Confrontation Clause rights. If respondents were correct that there were constitutional issues lurking in this case, those issues would simply have to be reached. For there is no authority suggesting that a court may disregard the specific terms of a duly enacted statute simply in the interest of avoiding a constitutional issue. In any event, applying Rule 804(b)(1) according to its terms would not present any serious constitutional question. Neither *Davis* v. *Alaska*, 415 U.S. 308 (1974), nor *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)—the two cases cited by respondents—suggests that hearsay testimony that has been found to possess no circumstantial guarantees of trustworthiness and whose truthfulness has been "seriously undercut," see Pet. App. 51a, must be admitted into evidence.

amount to pure speculation. In any event, this is not a case, like most of those cited by respondents, see Resp. Br. 32-36, in which the government has introduced evidence concerning allegedly privileged matter and then sought to bar a defendant from introducing further evidence concerning that same matter. The government did not introduce any evidence concerning Bruno's and DeMatteis's grand jury appearances, and it thus violates no principle of "adversarial fairness" for the government to object to respondents' introduction of that evidence.[3]

Finally, respondents argue (Resp. Br. 38) that the court of appeals' holding "is limited to testimony the government 'created,' " and that, at least as to that testimony, the court of appeals acted correctly in disregarding the similar motive requirement.

Respondents are mistaken. As to the scope of the court of appeals' holding, the Second Circuit in a decision filed one day after the petition for certiorari in this case was granted did indeed appear to limit its holding in this case to immunized former testimony. See *United States* v. *Bahadar*, 954 F.2d 821, 827-829 (1992). But the rationale of the court in

[3] Respondents also appear to argue (Resp. Br. 37-38) that the last paragraph of Rule 804(a), which provides that "[a] declarant is not unavailable as a witness if [the unavailability] is due to the procurement or wrongdoing of the proponent of a statement," in some way supports the court of appeals' result. To begin with, the last paragraph of Rule 804(a) is inapplicable in this case, since the government has engaged in no "procurement or wrongdoing" to obtain the unavailability of Bruno and DeMatteis. Their unavailability is due entirely to their own, independent decisions to invoke their Fifth Amendment privilege. In any event, as we explained in our opening brief (Br. 25-26), a determination that Bruno and DeMatteis were available to the government would not render their testimony admissible under the Federal Rules.

the present case was based on the fact that the government could make the declarants available by a grant of immunity, not the fact that the government had previously immunized the declarants in different circumstances and for a different purpose. See Pet. App. 21a-22a.[4] In any event, the court of appeals in *Bahadar* adhered to the crucial premise underlying the decision in this case. Despite acknowledging that the similar motive requirement is a "protective shield * * * written into rule 804(b)(1)," 954 F.2d at 828, the court continued to take the view that the similar motive requirement "could not be invoked by the government" where it was unnecessary to preserve "adversarial fairness." *Ibid.* While we disagree with the proposition that applying the Rule as written would contravene any principle of "adversarial fairness," our more fundamental disagreement is with the court's belief that a court applying the Federal Rules of Evidence is free to pick and choose among the requirements of those Rules depending on its own sense of fairness, in general or in a particular case.[5]

[4] The court stated that when a declarant is "available to the government * * * through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant." Pet. App. 21a. According to the court, "[w]hen the reason for the requirement [of similar motive] evaporates, so does the requirement." *Ibid.* (citing N. Singer, *Sutherland Statutory Construction* § 45.12, at 54-55 (4th ed. 1984)).

[5] Application of the court of appeals' principle is particularly troubling when, as here, it is used to reverse a conviction on the ground that the district court—which is in the best position to judge the "fairness" of the proceedings—simply applied the Federal Rules as written, rather than as modified in accordance with the court of appeals' sense of "adversarial fairness."

2. Respondents also argue (Resp. Br. 19-30) that the government did have a similar motive to develop the testimony of Bruno and DeMatteis in the grand jury. That argument, however, is incorrect and, in any event, does not address the issue on which this Court granted certiorari.

The court of appeals manifestly did not rest its decision on any finding that the government had a similar motive. The court's only comment concerning the government's motive was its statement that it "agree[d] that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a.[6] The court's decision plainly rested on its calculation that the government's ability to grant immunity to the declarants rendered Rule 804(b)(1)'s similar motive requirement "irrelevant." Pet. App. 21a, 24a. Indeed, when the court attempted in *Bahadar* to explain its decision in the present case, it did not indicate any doubt that the government lacked a similar motive. Instead, the court repeated its holding that the similar motive requirement "could not be invoked by the government." *Bahadar*, 954 F.2d at 828. In short, the decision of the court of appeals did not rest on any determination of similar motive. And the question on which this Court granted certiorari was whether evidence was admissible pursuant to Rule 804(b)(1) when the opposing party lacked a similar motive, not whether the government in fact had a similar motive on the facts of this case.

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[6] Although respondents speculate that the court of appeals made that acknowledgement "*arguendo* for purposes of demonstrating the irrelevance of motive," Resp. Br. 22 n.27, that speculation finds no support in the court of appeals' opinion.

a. As this case comes to this Court, there is little doubt that the government's motive to develop the testimony of Bruno and DeMatteis in the grand jury differed substantially from its motive to cross-examine them, had they testified at trial. The district court was in the best position to evaluate the government's motives to develop the grand jury testimony of Bruno and DeMatteis, as well as to consider what the government's motives would have been upon being presented with the same evidence at trial. In a carefully considered, written opinion, the district court found that the government did not have a similar motive. Pet. App. 42a-52a. As noted above, the court of appeals at least suggested that it agreed with that finding. There is thus no reason for this Court to question that finding. Cf. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (citing cases); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

The facts of this case demonstrate that the finding of the district court was correct. In our opening brief, we explained (Br. 11-15) that the government typically does not have a motive to develop grand jury testimony as envisioned by the Rule, for several reasons: the government must maintain the secrecy of the grand jury proceedings; the government has little incentive to discredit a grand jury witness by means of a vigorous, on-the-spot examination; and the issues before the grand jury are typically quite different from those at trial. All of those factors were present in this case.

Respondents argue that the secrecy of the grand jury proceedings was not an issue at the time Bruno and DeMatteis testified because "all the key parties and issues had been broadcast by the government in two indictments," Resp. Br. 20, and because the government confronted Bruno and DeMatteis with evidence derived from a wiretap, Resp. Br. 20 & n.25.

At the time Bruno and DeMatteis testified, the grand jury was continuing its investigation to determine whether additional individuals were involved in the racketeering enterprise and to determine whether operation of the racketeering enterprise had involved additional criminal activity. In fact, 11 of the 40 counts and 9 of the 44 predicate acts of racketeering included in the indictment on which respondents were tried did not appear in the initial indictment handed down before Bruno and DeMatteis testified. Additional counts and additional defendants were also under investigation when Bruno and DeMatteis testified, but those prospective charges were not included in the indictment. Consequently, respondents' assertions that the investigation was over or that all of the relevant facts were already public at the time Bruno and DeMatteis testified is without foundation.

Respondents also assert that the government in fact conducted a vigorous and thorough examination of Bruno and DeMatteis. Resp. Br. 21. That contention is mistaken. As is made clear by the portions of the grand jury testimony of Bruno and DeMatteis quoted by respondents (Resp. Br. 7-8, 10, 11), their examination in the grand jury was designed to elicit specific testimony sufficient to "tie [the witnesses] to the allegedly false story" to provide the basis for a perjury prosecution, if one were brought. Resp. Br. 21. But the examination by no means constituted a thorough development of their testimony, and Bruno and DeMatteis were never confronted with most of the detailed evidence in the government's possession indicating that their story was false.[7] See Resp. Br.

[7] Respondents assert that, under our argument, "the government's impetus to cross-examine a witness turns on *its own* evaluation of the witness' credibility, and not on any concern about what *the grand jury's* evaluation of the witness might be." Resp. Br. 29-30. In fact, we rely on the concern about "the grand jury's evaluation of the witness" as an additional reason that a prosecutor's motive to conduct an examination in the grand jury generally differs from his motive to confront the same witness at trial. Unlike at trial, the government can ask the grand jury whether it wishes a particular line of testimony developed further, or whether it believes that the testimony of a given witness has, or has not, been refuted by other evidence the grand jury has heard. Once informed that the grand jury does not want to hear more testimony from that witness, the prosecutor has no motive to continue the examination. Under the regime instituted by the court of appeals, however, the prosecutor would have to continue to examine the witness regardless of the grand jury's wishes, since to fail to do so could result in the admission of the witness's unimpeached testimony at trial.

21. Although Bruno and DeMatteis were asked a number of questions concerning their participation in and knowledge of the scheme to rig bids on large Manhattan construction projects, their answers were, by and large, accepted and not directly challenged. In particular, although the existence of one tape was disclosed, they were not confronted with any of the other tapes of conversations concerning the bid-rigging scheme, nor were they confronted with testimony that had been given by a number of individuals who later testified at trial but whose testimony, at the time of the grand jury appearances of Bruno and DeMatteis, remained unknown to respondents.[8]

[8] Respondents argue that the issues before the grand jury and those at trial, with respect to the testimony of Bruno and DeMatteis, were identical. Resp. Br. 21-22. That contention is mistaken. At trial, the testimony of Bruno and DeMatteis at best could have suggested that Cedar Park, the concrete firm Bruno and DeMatteis controlled, was not complicit in the bid-rigging scheme. Although the grand jury heard evidence

In short, the government's treatment of Bruno and DeMatteis in the grand jury was determined by the need to maintain the security of the investigation, the lack of incentive to confront Bruno and DeMatteis with the extensive evidence contradicting their testimony, and the distinct issues and context of the grand jury setting. Those were concerns that would have had little or no force if Bruno and DeMatteis had testified at trial. The district court, based on its familiarity with the trial proceedings, its examination of the grand jury transcripts and other sealed materials, and the submissions of counsel, determined that the government lacked a similar motive. There is no basis in this record for overturning that finding.

b. Respondents also argue (Resp. Br. 22-26) that the admissibility of the grand jury testimony of Bruno and DeMatteis "presents an unexceptional application

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relevant to that question, respondents advance no reason to believe that the grand jury was ever asked to decide whether Cedar Park—or Bruno and DeMatteis—were involved in the scheme. None of the charges added in the superseding indictments named Cedar Park or Bruno and DeMatteis. Moreover, contrary to respondents' contention, Cedar Park's complicity in the bid-rigging scheme was ultimately of little moment to the grand jury, especially in light of the probable cause standard by which the grand jury had to make its determinations. Cedar Park bid on only one of the 16 construction projects on which, according to the indictment, bids had been rigged, and Cedar Park ultimately withdrew even that bid. Even more significantly, Cedar Park started its last Manhattan job in 1982 and went out of existence approximately one year later. Eight of the 16 projects were not even bid until after Cedar Park had effectively left the business. Thus, respondents' contention (Resp. Br. 22) that the grand jury could not have handed down the superseding indictments in this case if it had believed that Cedar Park was not involved in the bid-rigging scheme is far-fetched.

of a hoary evidentiary principle" that "where the issue at stake in the former proceeding's testimony was substantially the same as the issue for which the former testimony is offered at trial, and the party against whom it is offered had the opportunity to cross-examine the witness, the motives are 'similar' and the hearsay comes in." Resp. Br. 22. According to respondents, that principle "was incorporated and expanded when Congress enacted Rule 804(b)(1)." Resp. Br. 22-23.

Respondents are mistaken. The ultimate questions in determining the admissibility of evidence under Rule 804(b)(1) are whether the opponent had an "opportunity *and similar motive*" (emphasis added) to cross-examine the declarant in the prior proceeding, not whether the opponent had an opportunity to cross-examine and whether the issues were substantially the same. As we explained in our opening brief, the Advisory Committee considered alternative formulations of the Rule, including one in which "identity of issues" would be the ultimate factor determining admissibility. See Br. 13 n.4. But the Committee ultimately rejected those alternatives and framed the rule in terms of "similar motive," a formulation that remained in the Rule when it was finally enacted into law by Congress.[9]

At bottom, respondents disagree with Congress's decision to frame Rule 804(b)(1) in terms of similar

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[9] To be sure, identity of issues may well remain a necessary condition of admissibility, for if the issues in two proceedings are not substantially the same, a party would be unlikely to have a similar motive to cross-examine testimony given in the two proceedings. But identity of issues is not sufficient to prove admissibility under Rule 804(b)(1). In the Rule as enacted, similar motive, not identity of issues, is the linchpin of admissibility.

motive, rather than identity of issues. Respondents repeatedly refer to the similar motive requirement in derogatory terms as permitting exclusion of evidence based on "a party's tactical decisions," Resp. Br. 24, 27, its "cross-examination strategy," Resp. Br. 25, or its view of what would be "expedient," Resp. Br. 27. Respondents' characterizations, however, miss the point.

When a party declines to cross-examine a witness because that party believes that its strongest case on the legal issues in the proceeding will be more effectively advanced thereby, that party has made a strategic decision that should bind the party when the witness's unimpeached testimony is offered at another proceeding involving the same legal issues. Accordingly, a court presented with such a case would reasonably find that the party had a similar motive to cross-examine in both proceedings, notwithstanding its failure to do so. But where, as here, a party declines to develop testimony fully for wholly legitimate reasons—indeed for reasons crucially related to the need to preserve the integrity of the proceeding—that are unrelated to that party's attempt to present its strongest case on the legal issues before the tribunal, that party's decision is not a matter of "strategy," "tactics," or "expedience." Rather, the party has declined to undertake a full examination because it lacked a motive to do so, and Congress's determination, embodied in Rule 804(b)(1), that that party ought not be bound by its prior handling of the witness should be respected.

CONCLUSION

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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